Supreme Court, U.S.
FILED

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No.

In The Supreme Court of the United States

GJELOSH PREL VUSHAJ, FILE VUSHAJ, AND MENDRIT VUSHAJ,
Petitioners,

v.

ALBERTO GONZALES, ATTORNEY GENERAL,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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April, 2007

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Immigration Judge acted contrary to the statute and deprived Petitioners of due process by holding them to an inappropriately high standard for evaluating their credibility where their asylum claim was corroborated by testimony and documentary evidence.

2. Whether Petitioners satisfied their burden of establishing that they suffered past persecution under 8 C.F.R. § 1208.13(b)(1)(i) and are refugees under section 101(a)(42)(A) of the Immigration and Nationality Act ("INA"), 8 U.S.C. 1101(a)(42)(A), and implementing regulations, where they presented credible evidence that they were the victims of multiple arrests, beatings, and threats to their lives.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Gjelosh Prel Vushaj, File Vushaj, and Mendrit Vushaj respectfully pray that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Sixth Circuit entered in this case on October 5, 2006 and January 17, 2007, respectively.

OPINIONS BELOW

The opinion of the Immigration Judge (App. E1 hereto) is unreported. The opinions of the Board of Immigration Appeals (App. C1 and D1) are unreported. The opinion of the Sixth Circuit Court of Appeals on the merits (App. B1), of which review is sought, is unreported. The order of the Sixth Circuit denying the petition for panel rehearing and suggestion for rehearing en banc in such case (App. A1) is unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit (App. B1) was entered on October 5, 2006. The court denied Petitioners' timely petition for rehearing on January 17, 2007 (App. A1). The jurisdiction of the Supreme Court is invoked under Supreme Court Rule 10(a), in that the Sixth Circuit has entered a decision in conflict with decisions of other United States courts of appeal on the same important matter and has sanctioned a

decision of the Board of Immigration Appeals that has so far departed from the accepted and usual course of proceedings, as to call for an exercise of this Court's supervisory power.

RELEVANT PROVISIONS INVOLVED

8 U.S.C. § 1101(a)(42) provides in relevant part:

> The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1158(a)(1) provides:

> Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port

of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

STATEMENT

(i) Nature of the Case

This is a petition for review of the decisions of the Board of Immigration Appeals ("BIA") and the Sixth Circuit Court of Appeals denying an asylum application based on minor inconsistencies where the application was supported by consistent testimony and corroborating evidence.

(ii) Proceedings at the Immigration Court

Petitioners Gjelosh Prel Vushaj ("Mr. Vushaj"), his wife File Vushaj ("Mrs. Vushaj"), and their son Mendrit Vushaj ("Mendrit"), are citizens of Albania. Mr. Vushaj and Mrs. Vushaj were admitted to the United States on March 10, 1997 as nonimmigrant visitors. Mendrit entered the United States without inspection on March 13, 1997.

While still in lawful nonimmigrant status, Mr. Vushaj filed a timely asylum application on May 27, 1997.

Mrs. Vushaj and Mendrit were derivative beneficiaries of this application. The Immigration and Naturalization Service ("INS")[1] referred Mr. Vushaj's asylum application to the Immigration Court. The INS issued Notices to Appear ("NTA") alleging that Mr. Vushaj and Mrs. Vushaj were removable for having remained in the United States longer than permitted, in violation of 8 U.S.C. § 1227(a)(1)(B), and that Mendrit was removable as an alien present without having been admitted or paroled, in violation of 8 U.S.C. § 1182(a)(6)(A)(i).

In proceedings conducted in Detroit, Michigan, the Petitioners admitted that all of the allegations contained in the NTAs were true, conceded removability, and applied for asylum and withholding of removal.

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[1] The Homeland Security Act abolished the INS effective March 1, 2003 and transferred its functions to various agencies within the Department of Homeland Security. Pub. L. No. 107-296, 116 Stat. 2135, 2192. The BIA and the Immigration Court remain part of the Department of Justice. This petition refers to the INS with respect to actions it took during its existence and to the appropriate agencies for events occurring after March 1, 2003.

On February 18, 2004, the Immigration Judge ("IJ") denied their applications and ordered them removed. The IJ concluded that Mr. Vushaj was not credible and that he filed a frivolous asylum application. App. E1.

(iii) Proceedings at the Board of Immigration Appeals

Petitioners timely appealed to the BIA. On January 14, 2005, the BIA adopted and affirmed the IJ's decision. App. D1. The BIA agreed with the adverse credibility and frivolous findings and dismissed Petitioners' argument that the IJ deprived them of a fair hearing. On June 21, 2005, the BIA denied Petitioners' motion to reopen. The BIA concluded that Petitioners' new evidence was not material and could have been provided earlier. App. C1. Petitioners timely petitioned for review to the Sixth Circuit Court of Appeals from both decisions, which consolidated the two petitions.

(iv) Statement of Facts

Mr. Vushaj's family support for democracy in Albania began before World War One. His grandfather, Gjeto Gjek Vushaj, fought for Albanian independence and died opposing the communist Serbian invasion in 1943. His father, Prel Gjeto Vushaj ("Prel"), and two uncles fought against the communists. Because of their political activism, the communists imprisoned his uncle Gjergj

Vushaj for ten years and confiscated his family's property. Gjergj was imprisoned from April 22, 1953 until May 30, 1961. Gjergj fled to Yugoslavia after his release from prison, leaving his wife and children behind. Gjergj died in Yugoslavia in 1975.

On February 26, 1984, Mr. Vushaj and his family were interned at Bushat, located outside of Shkoder in Albania. The communists kept him and his family in isolation for five years and tortured them. In the summer of 1990, his brothers Martin and Gjeto escaped Albania and received asylum in the United States.

Mr. Vushaj joined the burgeoning democracy movement in 1990 and, following the fall of the communist government, helped reconstruct the Catholic Churches in Albania. In recognition of his and his family's repression, the Association of Politically Persecuted ("APP") granted him membership in the organization.

On November 17, 1992, Mr. Vushaj was made a Captain in the Shkoder Police Department and was responsible for the application of law. He was responsible for law and constitutional rights at the police commission. While working as a police officer, he graduated from the University of Shkoder's justice program.

On May 5, 1994, he was ordered to prevent Socialist Party ("SP") leaders, including Fatos Nano and Bilbil Mema, from entering Shkoder because they wanted to lead an illegal demonstration. Mr. Vushaj arrested Mr. Mema. Following the SP's 1997 electoral victory, Mr. Mema was appointed Albania's chief of police, a position he held until he was dismissed in 2002 for failing to stop, and possibly assisting, human and drug traffickers.

On August 15, 1994, Mr. Vushaj was transferred to another police department to serve as the chief of criminality in the district of Malsi e Madhe. He was transferred because he refused to use force against a group of anti-communist protesters engaged in a hunger strike. On August 15, 1994, the secret police, led by Bashkim Gazidede, arrested him and detained him for ten days. No charges were ever brought against Mr. Vushaj and he was finally released after a popular outcry and the intervention of Albania's national government. While in detention, the police beat and tortured him, to the point where they thought he was going to die.

Even after his release and while serving in Malsi e Madhe, the secret police kept him under surveillance. Mr. Gazidede released many of the people that Mr. Vushaj arrested, including human traffickers. These criminals

were Mr. Gazidede's allies and he used them to seek revenge against Mr. Vushaj.

Following a brief visit to the United States, Mr. Vushaj returned to Albania at the end of January 1997. At the time, former communists and socialists were taking over the country, released most, if not all, of the prisoners, and raided weapons depots. The SP issued an order to kill police officers who served under the Democratic Party's government. Several police officers were killed during this period.

Mr. Gazidede released a child trafficker, Mr. Kola, who Mr. Vushaj arrested in 1997. Mr. Kola twice tried to kidnap Mendrit in February of 1997.

Mr. Mema, who Mr. Vushaj once arrested, told the State Department's consular officer that the Order for Mr. Vushaj's detention was a forgery. Mr. Mema was dismissed as chief of police in 2002 for failing to stop, and even assisting, human and drug traffickers. Mr. Vushaj believed that Mr. Mema would not verify an order issued by his department to kill police officers.

Gjeto Vushaj, Mr. Vushaj's brother, was arrested when he returned to Albania and was only released following the intervention of the United States Embassy.

His father, Prel, was shot on August 13, 2000, when he tried to reclaim the land that was stolen from their family.

The Vushajs submitted several affidavits corroborating their asylum claim. Tonin Pepaj met Mr. Vushaj in 1985 when they were both detained at an internment camp. Mr. Pepaj served as a police officer in Maliseamalle, which is adjacent to Shkoder, and knew with Mr. Vushaj. Mr. Pepaj was removed from his position in 1997 and threatened by the socialists and their supporters.

Dede Deda met Mr. Vushaj at pro-democracy demonstrations in 1990, 1991, and 1994. He confirmed that Mr. Vushaj was arrested for failing to use force against demonstrators in 1994.

Pjeter Beqi, an asylee, met Mr. Vushaj in 1985 near an interment camp. He confirmed Mr. Vushaj's pro-democracy activities and the fact that the latter was arrested at a 1994 pro-democracy demonstration.

The most recent State Department reports that Albania's "human rights record remained poor in many areas; although there were some improvements in a few areas, serious problems remained." "[P]olice officers largely were untrained, ill paid, and often unreliable" and "unprofessional behavior and corruption remained a major impediment to the development of an effective, civilian

police force. The police committed human rights abuses." Albania's police force beat and abused detainees and arbitrarily arrested and detained people.

In support of their motion to reopen, the Vushajs submitted additional corroborating evidence. Mark Malaj served as a police inspector in the Shkoder Police Department. He confirmed that, on August 15, 1997, the director ordered Mr. Vushaj's arrest and authorized the use of deadly force, if necessary.

Agostin Sterkaj also served with Mr. Vushaj on the police force. He confirmed that, on August 15, 1997, the chief of police gave Mr. Sterkaj a warrant to arrest Mr. Vushaj. Mr. Sterkaj took the warrant to the home of Mr. Vushaj's father. Prel refused to disclose Mr. Vushaj's location. Mr. Sterkaj left a copy of the warrant with Prel. The next day, Mr. Mema told Mr. Sterkaj to arrest Mr. Vushaj so he can be questioned about the Democratic Party.

(v) Statement of Court of Appeals and Supreme Court Jurisdiction

Jurisdiction in the Sixth Circuit Court of Appeals was proper. 8 U.S.C. § 1252(a)(2)(B). Venue was proper in the Sixth Circuit because an IJ sitting in Detroit, Michigan completed the Immigration Court proceedings. 8 U.S.C. § 1252(b)(2).

Petitioner invokes the jurisdiction of this Court on application for writ of certiorari under Supreme Court Rule 10(a), in that the Sixth Circuit has entered a decision in conflict with decisions of other United States courts of appeal on the same important matter and has sanctioned a decision of the BIA that has so far departed from the accepted and usual course of proceedings, as to call for an exercise of this Court's supervisory power.

REASONS FOR GRANTING THE WRIT

I. The Sixth Court Held Petitioners to an Inappropriately High Credibility Standard

The testimony and evidence "compel" the conclusion that Mr. Vushaj's asylum claim is credible. Ouda v. INS, 324 F.3d 445, 451 (6th Cir. 2003). The IJ's explanations do not survive close scrutiny.

The federal courts do "not accept blindly an IJ's conclusion that a petitioner is not credible." Liti v. Gonzales, 411 F.3d 631, 637 (2005) (internal citations omitted). The IJ must base his credibility determination on more than speculation, conjecture, or irrelevant inconsistencies, including "minor inconsistencies which are easily resolved by other facts in evidence. See Sylla v. INS, 388 F.3d 924, 926 (6th Cir. 2004). The IJ must offer detailed, specific, and cogent reasons for any stated

disbelief. Liti, 411 F.3d at 637; Secaida-Rosales v. INS, 331 F.3d 297, 307 (2d Cir. 2003). An alien's lack of credibility cannot form the basis for the denial of his application where independent, objective evidence supports a grant of asylum. Camara v. Ashcroft, 378 F.3d 361 (4th Cir. 2004).

When measured against Mr. Vushaj's years of suffering, the minor inconsistencies in the dates and details are "insubstantial and (do) not go to the heart of" his claim. See Liti, 411 F.3d at 638. Any conflict is "more apparent than real." Mece v. Gonzales, 415 F.3d 562, 575 (6th Cir. 2005). The important question is whether the events alleged actually occurred, not whether an alien made inconsistent statements. Pergega v. Gonzales, 417 F.3d 623, 629 (6th Cir. 2005) ("Whether Pergega *reported* the kidnapping and beating to the police is less relevant than the fact that he was *actually* kidnapped and beaten.")

The IJ erroneously focused on omissions from Mr. Vushaj's written application. Omissions from an asylum application does not automatically result in an adverse credibility finding because the "circumstances surrounding the application process do not often lend themselves to a perfectly complete and comprehensive recitation of an applicant's claim to asylum." See Liti, 411 F.3d at 637-38;

Vasha v. Gonzales, 410 F.3d 863, 871 n.4 (6th Cir. 2005). The purpose of the removal hearing "is not simply to reiterate the statements made in the asylum application, but rather to allow an alien 'to present evidence on the alien's own behalf' including to elaborate on the generalized claims made in the application itself." Liti, 411 F.3d at 639. Mr. Vushaj's written statements and applications were meant to summarize his claim with the intention of providing the extensive details at his merits hearing. He mentioned his 1994 arrest and detention and the threats in his statements but did not include all of the details, including his beating and the attempted kidnappings of his son.

As the Sixth Circuit noted, Mr. Vushaj was not responsible for obtaining the order for his detention and murder. App. B1. His father sent it to him and he did not intentionally submit a fraudulent document. Moreover, the accusations against Mr. Mema, who claimed the document was fraudulent, were not just "rumors" from "internet new agencies." These accusations were reported by the United States government-funded media outlet Radio Free Europe/Radio Liberty and by the BBC. This undercuts the reliability of Mr. Mema's statement that the order was fraudulent and, at the very least, it should not be held

against Mr. Vushaj, who was unaware of its character. The State Department reported extensively on the corruption of the Albanian police and the lack of training that police officers received.

The IJ refused to allow Mr. Vushaj to update his application at the start of his hearing. Had he allowed Mr. Vushaj to update and correct his application, Mr. Vushaj would have added the details that he fully and candidly disclosed during his testimony, including his criminal record.

The basis for the denial of the Vushajs' asylum application was the adverse credibility finding. This finding is contrary to the substantial evidence in the record. This case should be remanded to the BIA to allow it to determine, after taking their claim as true, if the Petitioners suffered past persecution and whether they are entitled to asylum protection.

The panel opinion and the IJ did not explain or justify many of the reasons given in finding that Mr. Vushaj was not credible. The few explanations offered by the IJ do not support an adverse credibility finding. The IJ misunderstood and mischaracterized the evidence, speculated as to the reason for the perceived discrepancies, and relied on minor or immaterial inconsistencies about

events that were not central to Mr. Vushaj's asylum claim. As the panel decision noted, Mr. Vushaj's new evidence is material to his claim and bolsters his credibility. The IJ and the BIA should have considered this evidence and its bearing on Mr. Vushaj's credibility and eligibility for asylum.

II. Petitioners Established Their Eligibility for Asylum

Mr. Vushaj submitted credible evidence that he suffered past persecution. The Panel Decision erred in concluding that the harm did not rise to the level of persecution. Mr. Vushaj was interned for nearly six years before the fall of communism.

The relevant inquiry is the severity of the harm and whether it was on account of a protected ground. The recency of the harm is only relevant to whether an asylum applicant continues to possess a well-founded fear of persecution.

An alien can have a well-founded fear of an event happening where there is as little as a one-in-ten chance of it taking place. INS v. Cardoza-Fonseca, 107 S. Ct. 1207, 1217, 480 U.S. 421, 94 L. Ed. 2d 434 (1987). The alien must subjectively "fear that he will be persecuted upon return to his country, and he must present evidence

establishing an objective situation under which his fear can be deemed reasonable." Mikhailevitch v. INS, 146 F.3d 384, 389 (6th Cir. 1998). An alien who satisfies his burden of establishing past persecution is presumed to have a well-founded fear of persecution. 8 C.F.R. § 1208.13(b)(1)(i).

Mr. Vushaj's family suffered years of persecution and many of his family members fled Albania. His brothers received asylum in the United States. Mr. Vushaj was interned by the Albanian communist government. He suffered numerous detentions and beatings, because of his political beliefs and activities, even while serving as a police officer. He finally fled Albania after threats to his family and two attempted kidnappings of his son.

Even if the presumption that Mr. Vushaj has a well-founded fear of persecution is rebutted by changed country conditions, he nevertheless remains eligible for humanitarian asylum if "there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country." 8 C.F.R. § 1208.13(b)(1)(iii)(B). This regulation codifies the rule announced in Matter of Chen, 20 I. & N. Dec. 16, 21 (BIA 1989) and implements the United States' obligations under international refugee law. "Other serious harm" is "harm that is not inflicted on account of race, religion, nationality, membership in a

particular social group, or political opinion, but is so serious that it equals the severity of persecution." 65 Fed. Reg. 76121, 76127 (2000); Krastev v. INS, 292 F.3d 1268, 1271 (10th Cir. 2002).

The decisions below are incompatible with other recent decisions finding that Albanian asylum applicants continue to demonstrate their eligibility for asylum. See Gilaj v. Gonzales, 408 F.3d 275, 285-86 (6th Cir. 2005); see also Gjerazi v. Gonzales, 435F.3d 800, 810-13 (7th Cir. 2006); Shtaro v. Gonzales, 435 F.3d 711, 716-17 (7th Cir. 2006); Caushi v. Attorney General, 436 F.3d 220, 227 (3d Cir. 2006); Halo v. Gonzales, 419 F.3d 15, 19 (1st Cir. 2005); Voci v. Gonzales, 409 F.3d 607, 614-16 (3d Cir. 2005).

The Sixth Circuit should have remanded the proceedings to the BIA to allow it to determine, in the first instance, if the Petitioners no longer possess a well-founded fear of persecution, and if so, whether they are entitled to humanitarian asylum. INS v. Ventura, 537 U.S. 12, 123 S. Ct. 353, 154 L. Ed. 2d 254 (2002).

CONCLUSION

Petitioners respectfully submit that the Sixth Circuit erred in the following respects:

- The court held Petitioners to an inappropriately high credibility standard where they presented the corroborating testimony and evidence that was reasonably available to them.

Therefore, Petitioners respectfully pray that the Court grant their petition for writ of certiorari and reverse the decisions of the Sixth Circuit Court of Appeals and the BIA.

Respectfully Submitted,

Marshal E. Hyman

Counsel of Record

Russell Reid Abrutyn

APPENDIX

6TH CIRCUIT:

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER, DENYING PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC,
FILED JANUARY 17, 2007

A-1 through A-2

No. 05-3156/3906

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GJELOSH PREL VUSHAJ, ET AL.,	)	
	)	
Petitioners,	)	
	)	
v.	)	ORDER
	)	
ALBERTO R. GONZALES, ATTORNEY GENERAL	)	
	)	
	)	
Respondent.	)	

BEFORE: MARTIN and **RYAN**, Circuit Judges; and **MARBLEY,*** District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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*Hon. Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINION,
FILED OCTOBER 5, 2006

B-1 through B-19

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 05-3156/05-3906

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GJELOSH P. VUSHAJ, FILE VUSHAJ, and MENDRIT VUSHAJ,
Petitioners,

v.

ALBERTO R. GONZALES, Attorney General,
Respondent.

ON APPEAL FROM THE BOARD OF IMMIGRATION APPEALS

Before: **MARTIN** and **RYAN**, Circuit Judges; and **MARBLEY**, District Judge*

BOYCE F. MARTIN, JR., Circuit Judge. Gjelosh Vushaj, his wife File, and son Mendrit are all citizens and natives of Albania. They petition this Court for review of the

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*The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

Board of Immigration Appeals's affirmance of the immigration court's decision denying their application for asylum, withholding of removal and relief pursuant to the United Nations's Convention Against Torture. Additionally, the Vushajs' appeal the Board's decision that their applications were frivolous and denying their motion to reopen the hearing. Based on the discussion below, we deny the petition for review as to the Vushajs' removability and their motion to reopen.

I.

Gjelosh and File Vushaj previously entered the United States on January 31, 1994, visiting relatives for one month. Mr. Vushaj returned to the United States on January 13, 1997, visiting relatives for twenty-five days. Most recently, Mr. and Mrs. Vushaj entered the United States as non-immigrant visitors for pleasure on March 10, 1997.[1] They were authorized by the Immigration and Naturalization Service ("INS") to stay in the United States until September 9, 1997.

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[1]Mr. Vushaj's passport was actually stamped March 1, 1997, however he claims that this date is incorrect and the correct date of entry was March 10, 1997. In support, Vushaj points out that his passport shows that, like his wife, he entered Bulgaria on March 9, 1997 and left on March 10, 1997.

Mendrit entered the United States without inspection on March 13, 1997.

On May 27, 1997, Vushaj filed an application for asylum with the INS on behalf of himself and his family. Subsequently, the Vushajs applied for withholding of removal under the United Nations Convention Against Torture. On January 20, 1998, the INS issued a Notice to Appear, charging that Mr. and Mrs. Vushaj were subject to removal from the United States having stayed in the United States longer than permitted in violation of section 237(a)(1)(B) of the Immigration and Nationality Act ("INA"). The INS also issued a Notice to Appear, charging that Mendrit was subject to removal as an alien present in the United States without being permitted or paroled in violation of section 212(a)(6)(A)(i) of the INA. The Vushajs have conceded that they are subject to removal.

On February 4, 2004, the immigration court conducted a merits hearing on the Vushajs' applications. Mr. Vushaj was the first and primary witness for the family's application and he testified to the following facts, supplemented by the statement he submitted to the immigration court with his family's application.

On February 26, 1984, Vushaj and his family were forcefully displaced from their home in Shkodra, Albania to the Bushat Camp because of their opposition to communism. During their five years in isolation, Vushaj and his family were tortured by communists. In 1990, Vushaj's two brothers, Martin and Gjeto Vushaj, escaped from internment and eventually received political asylum from the United States. After the fall of communism, Vushaj joined the emerging democratic party in hopes of establishing a democracy in Albania. In 1992, the Albanian parliament enacted laws allowing political prisoners under the communist regime to obtain positions in the police force. On November 17, 1992, Vushaj was appointed as an officer of the Shkoder Police Department. On May 5, 1994, Vushaj arrested socialist leaders, including Bilbil Mema and Fatos Nano for attempting to lead illegal demonstrations. Mema was later appointed director of the Albanian police and Nano became the prime minister of Albania.

Vushaj testified that on August 15, 1994, he was arrested by Baskim Gazidede, leader of the secret police, because he refused to place weapons in the building that was the site of a hunger strike. Vushaj claims that he was severely

tortured while in prison. According to Vushaj, he remained in prison for ten days and was released after President Sali Barisha acknowledged that Vushaj's actions were legal. After his release, Vushaj claims that the secret police made it difficult for him to complete his duties as a police officer. On several occasions the secret police would release, prisoners whom Vushaj arrested. After their release, the criminals sought to locate and kill Vushaj and his family.

In early 1997, the communists regained power in Albania and ordered all pro-democratic police officers killed. Many of Vushaj's friends were killed by the communists. He testified that he received a note under his door threatening him and the lives of his family. The communists burned down the police department and military division. Vushaj testified that one of the men who he had previously arrested, Tolin Kola, tried to kidnap Mendrit twice. Vushaj additionally claimed that Nano issued an order out for his arrest. However, Mema, the director of the police and who was formerly imprisoned by Vushaj as being a socialist leader, stated that the order was fake and that there was never order issued for Vushaj's arrest. Vushaj claimed that the document is authentic because it was consistent with events that occurred

in Albania. Additionally, Vushaj alleged that two men were sent by Nano to the United States to kill him.

Mrs. File Vushaj testified that she sought asylum in the United States because she was afraid for her life due to her husband's position as a police officer in Albania. She confirmed that her husband had in fact been arrested for ten days in 1994. When asked to describe her husband's physical condition when released from jail, she described him as "exhausted", "upset" and "sad". She also claims to have been present during the two attempted kidnappings of Mendrit. She stated that "they tried to kidnap him at home and two weeks later they tried to kidnap him outside when they tried to put him in the car." Although she could no longer remember exactly when the alleged kidnappings took place, she said they occurred in February of 1997.

Mendrit also testified that there had been two attempts to kidnap him. The first attempt involved a man trying to kick down his door. Mendrit called the police and they apprehended the man. The second attempt occurred two to three weeks later. Mendrit claims that several men chased him with a car until he ran into his cousin's store. Mendrit could not explain why he thought these incidents were

attempted kidnappings and not attempted robberies or something else.

Mendrit claims that his name is actually "Madrid" even though all official documents including his driver's license spell his name as "Mendrit." He claims that his name was misunderstood when he came to the United States. The immigration court dismissed this explanation because several documents such as the application for asylum, which were filed by Mr. Vushaj, continued to use "Mendrit." The immigration court asked Mendrit, "[a]re you telling me that your father can't tell the truth about the most minor thing," to which Mendrit answered affirmatively.

II.

On February 18,2004, the immigration court denied the Vushajs' applications for asylum, withholding of removal, and relief under the Convention Against Torture. The immigration court cited several inconsistencies between testimony given, evidence submitted and the actual present situation in Albania. First, Vushaj could not provide a reason as to why he was severely beaten during his ten-day detainment in 1994. Further, when Mrs. Vushaj testified about the physical condition of her husband after the ten days

in prison, she, despite every opportunity, failed to mention any physical injuries visible on him. On their application for asylum, Vushaj spelled his son's name as "Mendrit", yet his son testified that his name is in fact spelled "Madrid." Additionally, Vushaj wrote March 1, 1997 as the date of his arrival in the United States on the application for asylum, which is consistent with the stamp on his passport. Yet, both Mr. and Mrs. Vushaj testified that date was incorrect and the actual date was March 10, 1997.

Vushaj presented an arrest order allegedly issued by Nano (the socialist leader who became the prime minister of Albania), that was later verified to be fraudulent by the Albanian government. The immigration court thought it suspicious that Vushaj's father is who alerted Vushaj as to the presence of the order, yet when the father testified he never was asked one question pertaining to the order. Vushaj knew that the order was verified false as early as April of 2000 and failed to obtain further evidence supporting the accuracy of the order by the time testimony was taken in February of 2004. Additionally, Vushaj was asked if he had been convicted of a crime since his stay in the United States to which he said that he had not. Yet, the government produced

evidence demonstrating that Vushaj pled guilty to "resisting and obstructing a police officer and domestic violence and battery on his wife." The immigration court found that the testimony given regarding the alleged kidnapping attempts was speculative even if all testimony is believed.

Finally, the immigration court found the Vushajs' description of Albania to be inconsistent with the evidence submitted by the government. The immigration court acknowledged that while there had been an "implosion of anarchy" in 1997, present day Albania is much more balanced; that major shifts in the political structure of the Albanian government has made the country stable. Further, Vushaj did not present enough evidence demonstrating that what he feared was in fact political persecution rather than "part of the vicissitudes of being a police officer."

The immigration court felt that because of all of the "red flags" in Vushaj' s story and apparent ease to which he would change his story, Vushaj was not credible and therefore the immigration court denied the applications for asylum and withholding of removal. Further, the immigration court found the application for asylum to be frivolous pursuant to 8 C.F.R.

§ 1208.20 because of two fraudulent documents presented by Vushaj. The first was the alleged arrest order. The other was Mendrit's birth certificate, which had the name as "Mendrit." Because Mendrit testified, that his name was actually spelled "Madrid," the immigration court found the birth certificate to be fraudulent. Indeed, Mendrit testified that his father was not always truthful. In conclusion, the immigration court ordered the Vushajs' removal from the United States to Albania.

The Vushajs filed a timely appeal with the Board of Immigration Appeals ("Board"). On January 14, 2005, the Board adopted and affirmed the immigration court's decision, including the determination that Vushaj was not credible and that the application for asylum was frivolous. On February 8, the Vushajs petitioned this Court to review the Board decision (No. 05-3156). On April 7, the Vushajs filed a motion to reopen their case with the Board because of "newly discovered and previously unavailable evidence material to the Immigration Court's adverse credibility and frivolous findings." The new evidence consisted primarily of statements from Mark Luke Majal and Agostin Sterkaj, both Albanian police inspectors in 1997, confirming that there was an arrest order for Vushaj issued on August 15, 1997. On June 21,

2005, the Board denied the motion to reopen because the newly offered evidence could have been offered earlier. Further, according to the Board, the new evidence did not rebut the other discrepancies in the Vushajs' claims. On July 14, 2005, the Vushajs petitioned this Court to review the Board's decision denying the motion to reopen (No. 05-3906). This Court consolidated both petitions for review.

III.

A. The Vushajs' Applications for Asylum and Related Relief

This Court's review of administrative asylum and withholding of removal eligibility determinations is limited to a deferential standard. In reviewing decisions of the Board denying an application for asylum, the determination is upheld if supported by reasonable, substantial, and probative evidence on the record considered as a whole. *Mikhailevitch v. INS*, 146 F.3d 384, 388 (6th Cir. 1998) (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992)). We will reverse only if the evidence presented by the Vushajs was such that a reasonable factfinder would not fail in concluding that the requisite fear of persecution existed. *Elias-Zacarias*, 502 U.S. at 483-84 (citing *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939)).

The Attorney General may grant asylum to any person who qualifies as a "refugee." 8 U.S.C. § 1158(b). A refugee is a person unable or unwilling to return to his country "because of persecution or a, well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A}. To prove one's refugee status, one must present specific facts demonstrating suffering of past persecution or a well-founded fear of future persecution motivated by one of these five statutorily protected grounds. *See Elias-Zacarias*, 502 U.S. at 481. The applicant's testimony, if credible, "may be sufficient to sustain the burden of proof without corroboration." 8 C.F.R. § 208.13(a). To prove a well-founded fear of future persecution, an applicant must actually fear that they will be persecuted upon return to their country, and they must present evidence establishing an "objective situation" under which his fear can be deemed reasonable. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440-41 (1987).

In this case, the Board and the immigration court were in agreement that the fatal flaw in the Vushajs' applications was the credibility of Mr. Vushaj's testimony. Therefore, it is

that adverse credibility determination we review. "[C]redibility determinations are considered findings of fact, and are reviewed under the substantial evidence standard." *Sylla v. INS*, 388 F.3d 924,925 (6th Cir. 2004). Based on that standard, this Court must treat findings of fact as "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." *Yu v. Ashcroft*, 364 F.3d 700, 702 (6th Cir. 2004) (quoting 8 U.S.C. § 1252 (b)(4)(B)).

In coming to this adverse credibility determination, the immigration court provides, in its twenty-six page oral decision, a laundry list of reasons why the court did not believe Mr. Vushaj to be credible. Vushaj failed to mention the beating and torture during his imprisonment in 1994 in his written applications. Despite allegedly being beaten to a pulp and almost dead, Vushaj's wife failed to recall any physical injuries to Mr. Vushaj after his imprisonment. Vushaj also failed to include the two alleged attempted kidnappings of his son on any of his written applications. Additionally, Vushaj lied during his testimony when he said that he had never been convicted of a crime in the United States. In fact, Vushaj had pled guilty to obstructing a police officer and domestic violence and battery to his wife. This guilty plea was also not

included on any of Vushaj's written applications. In sum, the immigration court found Vushaj's testimony to be "vague," "ambiguous," "nonsensical," and most importantly not credible.

The immigration court also found the Vushajs' applications suspect because of two documents which the court found to be forgeries. One was the birth certificate of Mendrit, which is spelled Mendrit on the birth certificate while the young man testified to being named Madrid. Although the immigration court feels this document is of great import to the credibility of the Vushajs, it seems to this Court to be a highly irrelevant inconsistency. *See Sylla*, 388 F.3d at 926 (holding that adverse credibility findings cannot be based on "an irrelevant inconsistency").

The second document that the immigration court found to be fraudulent was the order for Vushaj's detention and murder issued on August 15, 1997. The State Department found this document to be a forgery upon contacting the Director of the Police for Shkodra, Bilbil Mema. Vushaj argues that Mema has suspect credibility in refuting the document because Mema has been accused of collaborating with human and drug traffickers and because Mema was the

one who issued the order against Vushaj. Neither of these accusations were credible to the immigration court and we have no basis to question this determination. The accusations against Mema sound more like rumor, coming from two internet news agencies. Additionally, Mema's name and signature appear nowhere on the order despite the fact that his title as Director of Police appears on the document as the person authoring the order.

Considering these inconsistencies from Vushaj's testimony, his applications, and other documents presented to the immigration court, there was substantial evidence to support the immigration court's adverse credibility determination. This evidence certainly does not rise to the standard that "any reasonable adjudicator would be compelled to conclude to the contrary" of this adverse credibility finding. *Yu*, 364 F.3d at 702.

B. The Frivolousness of the Vushajs' Applications

The immigration court decided that the Vushajs' applications were frivolous based on their submission of two documents which they knew to be fraudulent: the birth certificate and the order for detention. This finding was affirmed by the Board. Under 8 C.F.R. § 1208.20, "a finding

of frivolousness does not automatically flow from an adverse credibility determination." *Muhanna v. Gonzales*, 399 F.3d 582, 589 (3rd Cir. 2005). Rather, the immigration court must

> specifically find [] that the alien knowingly filed a frivolous asylum application. For purposes of this section, an asylum application is frivolous if any of its *material elements is deliberately fabricated*. Such a finding shall only be made if the immigration judge or the Board is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim.

8 C.F.R. § 1208.20 (emphasis added). In this case, the birth certificate discrepancy is not a "material element" and, therefore, should not have been considered as a reason for the applications to be determined to be frivolous. Additionally, the discussion from the immigration court never adequately explains how the submission of the detention order was a deliberate act by Vushaj to mislead the immigration court. By Vushaj's own admission, he received the document via his father, who had received it from a family friend in Albania. Considering this chain of possession that the document took, along with its look of veracity, the immigration court appears

to have erred to assume that Vushaj presented this document to intentionally defraud the immigration court.

Therefore, we reverse the immigration court's determination that the Vushajs' applications were frivolous.[2]

C. The Vushajs' Motion to Reopen their Case

Finally, the Vushajs appeal the Board's decision denying their motion to reopen the proceedings. "The decision to grant or deny a motion to reopen ... is within the discretion of the Board." 8 C.F.R. §.1003.2(a). We review the Board's denial of a motion to reopen for an abuse of discretion. *Haddad v. Gonzales*, 437F.3d 515,517 (6thCir. 2006). In order for a Board to consider a motion to reopen the proceedings, it must be accompanied by evidence which is "material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 1003.2(c)(l).

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[2]Despite this favorable ruling on Vushaj's frivolousness appeal, it has no bearing on this Court's final result. If an alien is determined to have submitted a frivolous application, then they are no longer eligible for any benefits of asylum. 8 U.S.C. § 1158(d)(6). Because of the immigration court's adverse credibility determination (and our affirmance of that decision), the Vushajs are not eligible for asylum even with their application being held to be not frivolous.

In their motion to reopen the case, the Vushajs presented the Board with two handwritten letters from two former Albanian police officers who wrote to confirm that the contents of the detention order were true. While these documents are clearly material to the previous holdings of the immigration court and the Board, Mr. Vushaj never explained to the Board why these statements were previously unavailable, especially in light of the four-year delay between Vushaj's initial merits hearing in 2000 and the final one conducted in 2004. Vushaj's brief provides no guidance, only to say the evidence was "previously unavailable." This is insufficient to demonstrate an abuse of discretion by the Board.

Therefore, we affirm the decision of the Board denying Vushaj's motion to reopen his case.

IV.

Based on the above discussion, we DENY the Vushajs' petition for review as to their removability and their motion to reopen, but REVERSE the Board's decision that their application was frivolous.

RYAN, Circuit Judge, concurring in part and dissenting in part. Our "substantial evidence" standard of

review does not permit us to disturb the IJ's finding that the petitioners' lack of credibility precludes their request for asylum and related relief. But, in my view, neither does it permit us to disturb the IJ's conclusion that Gjelosh Vushaj's application was frivolous. I would not have made that finding had I been the authorized fact finder, but I was not, and I cannot say, given the record before us, that the IJ's finding was not supported by substantial evidence.

That said, I concur in the court's judgment denying the petition for review.

APPENDIX C

BOARD OF IMMIGRATIONS APPEALS

DECISION OF THE BOARD OF IMMIGRATION APPEALS FILED JUNE 21, 2005

C-1 through C-4

U.S. Department of Justice
Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Hyman, Marshal E., Esquire
3250 W Big Beaver, Ste 529
Troy, MI 48084-2902

Office of the District Counsel/DE
333 Mt. Elliott St., Rm. 204
Detroit, MI 48207

Name: VUSHAJ, GJELOSH PREL **A75-310-405**
RIDERS: 75-310-406 75-310-407

Date of this notice:
06/21/2005

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ Frank Krider
Frank Krider
Chief Clerk

Enclosure
Panel Members:
MILLER, NEIL P.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board
Immigration Appeals

Falls Church, Virginia 22041

File: A75 310 405 - Detroit Date: Jun. 21, 2005
A75 310 406
A75 310 407

In re: GJELOSH PREL VUSHAJ
FILE VUSHAJ
MENDRTI VUSHAJ

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS:
Marshal E. Hyman, Esquire

ON BEHALF OF DHS:
Michael B. Dobson, Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] - In the United State in violation of law (75 310 405, 406)

Sec. 212(a)(6)(A)(i), I&N act [8 U.S.C. § 1182(a)(g)(A)(i)] - Present without being admitted or paroled
(75 310 407)

APPLICATION: Reopening

ORDER:

PER CURIAM. The motion to reopen is denied.[1] The documents which the respondent has submitted with his motion in an attempt to corroborate his previously denied claims are insufficient to justify reopening. The two most salient documents he has submitted are merely handwritten letters by individuals who claim some knowledge of the respondent's prior circumstances in Albania. As the Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) has indicated in its opposition to reopening, the respondent failed to show that such evidence could not have been obtained previously. In the Immigration Judge's

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[1] This case was last before this Board on January 14, 2005, when we upheld an Immigration Judge's denial of the lead respondent's ("respondent," Gjelosh Prel Vushaj, 75 310 405) claims for asylum, withholding of removal, and protection under the Convention Against Torture, as well as the Immigration Judge's finding that the respondent had submitted a frivolous claim. The other respondents in this case are the spouse and son of the lead respondent, and are derivative applicants.

underlying decision it was noted that the respondent had failed even at that time to attempt to rebut the State Department's finding that the respondent's Albanian arrest warrant was fraudulent. Notably, the respondent has not explained why he did not attempt to supply such evidence while his appeal was pending. Further, none of the newly submitted documents directly addresses the specific findings made in the State Department's investigative report, nor do any of the documents reach the numerous other discrepancies in the respondent's claims, as previously cited by the Immigration Judge and upheld by this Board on appeal.

/s/ Neil P. Miller
FOR THE BOARD

APPENDIX D

BOARD OF IMMIGRATIONS APPEALS

DECISION OF THE BOARD
OF IMMIGRATION APPEALS
FILED JANUARY 14, 2005

D-1 through D-4

U.S. Department of Justice
Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Owen, Charles S., Esquire
25899 West 12 Mile Road
Suite 120
Southfield, MI 48034-0000

Office of the District Counsel/DE
333 Mt. Elliott St., Rm. 204
Detroit, MI 48207

Name: VUSHAJ, GJELOSH PREL A75-310-405
RIDERS: 75-310-406 75-310-407

Date of this notice:
01/14/2005

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ Frank Krider
Frank Krider
Chief Clerk

Enclosure
Panel Members:
PAULEY, ROGER.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board
Immigration Appeals

Falls Church, Virginia 22041

File: A75 310 405 - Detroit
A75 310 406
A75 310 407

Date: Jan. 14, 2005

In re: GJELOSH PREL VUSHAJ
FILE VUSHAJ
MENDRTI VUSHAJ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:
Charles S. Owen, Esquire

ON BEHALF OF DHS:
Kathleen L. Alcorn, Deputy Chief Counsel

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge, which found the respondents removable; denied their applications for asylum and withholding of removal under the Immigration and Nationality Act as well as for relief under the United Nations Convention Against Torture; and ordered them

removed from the United States to Albania. *See Matter of Burbano*, 20 I&N Dec, 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those the Immigration Judge articulated in his or her decision"). We agree that the lead respondent did not testify credibly and that he failed to meet the burdens of proof on his claims of persecution and torture. We also join in the determination that the asylum application is frivolous. Finally, with respect to the respondents' assertions that their removal proceedings were unfair, we find that they have not demonstrated any error by the Immigration Judge in evaluating the evidence, in applying legal standards, or otherwise in conducting their hearings. Moreover, the respondents have not demonstrated any resultant prejudice such as would constitute a due process violation, particularly in view of their failure to establish eligibility for any relief from removal. *See Vides-Vides v. INS*, 783 F.2d 1463, 1469-70 (9th Cir. 1986); *Nicholas v. INS*, 590 F.2d 802, 809-10 (9th Cir. 1979); *Martin-Mendoza v. INS*, 499 F.2d 918, 922 (9th Cir. 1974), cert. denied, 419 U.S. 1113 (1975).

Accordingly, the appeal is dismissed.

/s/ Roger Pauley
FOR THE BOARD

APPENDIX E

ORAL DECISION AND ORDERS
OF IMMIGRATION JUDGE
FILED FEBRUARY 18, 2004

E-1 through E-33

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
Detroit, Michigan

File No.: A 75 310 405/406/407 February 18, 2004

In the Matter of	)	
	)	IN REMOVAL PROCEEDINGS
GJELOSH PREL VUSHAJ,	)	
FILE VUSHAJ,	)	
MENDRIT (aka MADRID)	)	
VUSHAJ	)	
Respondents	)	

CHARGE: (Cases ending 405 and 406 only): Section 237 (a)(1)(B) of the Immigration and Nationality Act, as amended - remained longer than time permitted

(Case ending 407 only): Section 212(a)(6)(A)(I) of the Immigration and Nationality Act, as amended - present from the, United States without being admitted or paroled or who has arrived in the United States at an time or place other than that designated by the Attorney General

APPLICATIONS: Asylum and withholding of removal.

ON BEHALF OF RESPONDENT:
Charles S. Owen, Esquire

ON BEHALF OF DHS:
Kathleen Alcorn,
Associate Chief Counsel

ORAL DECISION AND ORDERS OF THE IMMIGRATION JUDGE

Background

The lead respondent, Gjelosh, the respondent in the case ending in 405, is the lead respondent. He is 47 years of age, a native and citizen of Albania. The next respondent, File, the respondent ending in the case 406, is his wife. She is also a native and citizen of Albania. These two individuals entered the United States as visitors at New York City in the first 10 days of March. The evidence is consistent. Either it was the first of March of 1997, or the 10th of March of 1997. The remaining respondent, whose name officially in the Court's record is Mendrid, who told the Court his name was wrong, that it was really Madrid, is 18 years of age. He is again the son of these two other respondents. He, like his parents, is a native and citizen of Albania. He entered the United States without inspection at some unknown location on or about the 13th of March of 1997.

The Immigration and Naturalization Service (hereinafter Service) which has since been redesignated as part of the Department of Homeland Security, commenced removal proceedings against all three respondents and has charged them as removable pursuant to the above-mentioned sections of the Immigration and Nationality Act, as amended (hereinafter Act or INA).

The Notices to Appear in each case were designated as Exhibits 1, 1A, and 1B, respectively. All of them were served upon the respective respondents within one year of their arrival. Through counsel, respondents have admitted all the factual allegations, as well as the respective charge in each Notice to Appear. As their removability has been conceded, it has thus been established by clear and convincing evidence. As each declined to designate a country of removal, Albania has been designated pursuant to Section 241(b) of the Act should such action become necessary.

The lead respondent filed an administrative asylum application on May 27, 1997, with the Service. As referred to this court for adjudication, it is Exhibit 2. Most of the document says see attached, and there is an attached statement

immediately following the pre-printed form. The attached statement was signed by the interpreter and the lead respondent on March 24th of 1997.

Respondent, through current counsel, filed a supplement to the asylum application with this Court. The supplementary application is Exhibit 3. It was filed before Judge Walsh of this court on January 15th of 1999. This application is, in essence, the same as the one found at Exhibit 2, although some of the discreet questions on the form were answered, but the statement appended to the application of March 24, 1997, is also appended to this application without change.

Respondents on or about June 29th of 1999 filed an application found at Exhibit 5. The reason for filing this is that respondent wanted to be considered eligible for withholding of removal pursuant to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment (hereinafter Torture Convention) pursuant to 8 C.F.R. 1208.16. The Court notes that this application is slightly different, not in content but in form. The content of the application is basically the same; however, respondent does not append the same

previous statement. However, he does append other statements which were designed to corroborate his claim. The Court also notes that at Exhibit 3 are a number of allegedly corroborating documents as well.

On May 3, 2000, the respondent appeared before this Court and signed his application at Exhibit 5 with the understanding that it incorporated the other two applications.

Ultimately, a hearing on respondent's applications was held on February 4, 2004. There was an attempted hearing on May 3, 2000; however, there was some difficulty with the translator during the testimony portion of the respondent's case in chief and the Court then stopped the proceeding and ordered that a new interpreter be produced. The following in the evidentiary portions of this decision will only reflect what happened at the evidentiary hearing held on February 4, 2004.

Based upon the applications as found at Exhibits, 2, 3, and 5, the respondent is seeking three major forms of relief. First, asylum under Section 208 of the INA; second, withholding pursuant to Section 241(b) (3) of the INA; and, third, withholding pursuant to the Torture Convention as delineated above.

Obviously, none of the applicants are eligible for voluntarily departing the United States at the conclusion of these proceedings, as all three of them had their Notice to Appear served upon them within one year of their last arrival in the United States. See INA Section 240B(b).

The Court notes, of course, that the application as found as Exhibits 2, 3, and 5 incorporate not only the lead respondent, but his wife and child, as a spouse or a child of an applicant who has been granted asylum may, if not otherwise eligible, be granted the same status as the principal alien. Inasmuch as the adult male has filed this asylum application and the remaining respondents are dependent upon him, this decision will mostly focus upon his claim with references to the other family members when necessary and appropriate.

The Lead Respondent's Claims

The lead respondent's claims for asylum and withholding under the statute and treaty are identical. The Court notes that of course a detailed recitation of this claim is found at the statement appended to Exhibits 2 and 3. The respondent, however, has given the Court a Reader's Digest

version of this statement in the Torture Convention application, Exhibit 5, page 4.

At Exhibit 5, page 4, the respondent indicated that is family had a long history of being discriminated against by the former Communist government in Albania. He also says that he has been a member of the Association of Formerly Persecuted People or Prisoners since 1992. He also claimed in this application, as well as the others, that he was a member of the Democratic Party since 1971. Obviously, this is a scrivener's error, since the party was not founded until the 1990's. In any event, at page 4, part C, sub-part 1, he continues in his Torture Convention application by saying that following the change of the government, he became a captain of the city police in Shkoder. He also, in his testimony, called this as being a chief. He then says that he spoke out against the actions of the new government denying rights to former prisoners. The former Sigurimi, or also called the Sheik or the secret police, arrested "me on August 15, 1994, and charged me with supporting the Association of Anti-Communists. I was held for 10 days until I was released." He then says upon his release he was reassigned to the police department in Shkoder, but at a lower rank, and under the supervision of a

former Communist official of the secret police. In his testimony he said he was also reassigned again.

He then says that he visited the United States in January of 1997 and when he returned to the country everyone was protesting the failure of the pyramid scheme organized by the government. That would have been the Democratic government. During the state of the emergency that was proclaimed by the government, I was ordered to join a special army unit to bring the city of Vlora under control. He then says under the guise of these special orders, former members of the Sigurimi were seeking out and killing those Democrats who were now in position of power. Several of his friends, whom he indicated were policemen at that juncture, were killed. He then says,"former Communists broke into jails and seized weapons and targeted (supporters) of the democratic movement." He then says that his family received a note in their home threatening them with death. In order to protect the family, they came to the United States. In his testimony he said he came with his wife. His son came a few days thereafter.

Asylum and Withholding of Removal Evidentiary Standards

An applicant for asylum or withholding of removal bears the evidentiary burdens of proof and persuasion. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985), modified Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987) .

An applicant for asylum must demonstrate that he is a refugee within the meaning of Section 101(a) (42) of the INA. This requires him to show that he is unwilling or unable to return to his country of nationality because of past persecution, coupled with either a showing of the likelihood of present or future persecution, or for humanitarian reasons as a matter of discretion, or because he has a well-founded fear of future persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion. Mogharrabi, supra. See also 8 C.F.R. 1208.13.

An applicant for withholding pursuant to Section 24l(b) (3) must demonstrate a clear probability of persecution on account of the statutorily-enumerated grounds. INS v. Stevic, 467 U.S. 407 (1984). This Stevic Court held that the clear probability standard requires a showing that it is more likely than not he would be subject to persecution. See also, 8 C.F.R. 1208.16.

In INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) the Court also held that the terms well-founded fear and clear probability are significantly different, and that the burden of proof required to establish eligibility for asylum is lower than that required for withholding of removal.

Respondent is also applying for withholding pursuant to the Torture Convention. Here, the respondent has to demonstrate that it is more likely than not he would be tortured if removed to the proposed country of removal. In assessing whether the applicant has satisfied his burden, the Court must consider all evidence relevant to the possibility of future torture, including, but not limited to, evidence of past torture inflicted; evidence of gross, flagrant, or mass violations of human rights within the country; and other relevant information about conditions in Albania. See, generally, 8 C.F.R. 1208.16 (c) .

Evidence, Discussion and Findings

The Court is now going to embark upon a discussion of the evidence of record. The Court will look at the documents in a chronological fashion, intertwining with it selected comments about the testimony of several witnesses.

At the conclusion of the examination of the documentary evidence of record, the Court will then address portions of the testimony of the witnesses.

As an introductory comment to the evidence, the Court notes that the Government conceded that respondent would testify consistently with this application up until the time he was appointed as a police officer after the fall of the Communist government. This means that it is undeniable that respondent's family, like most other people in Albania, had been severely maltreated, if not persecuted, by the former Communist government. This, of course, is mostly irrelevant, as the lead respondent, at least, came to the United states two times before he fled Albania allegedly in fear of his life. When he did, he then applied for asylum. Although it does provide background information, it tries to show, at least in respondent's belief, why he fears the current government of Albania.

As mentioned above, Exhibit 2 is the original asylum application. It spells his son's name at page 2 as Mendrit, with a birth date of April 24th of 1985. As mentioned above, it contained the basic statement dated March 24th of 1997, signed by the translator, as well as the lead respondent,

outlining in detail his claim. The application at page 5 reflects that he was held in jail "for 10 days in 1994 for my support of democratic reforms." The continuing statement at page 2 says after his employment by the Democratic government in Albania, that's the government headed by the Democratic Party, he was arrested because the Sigurimi on August 15th of 1994, "They put me under arrest and finally I was arrested for good under the accusation that I supported the 'Association' and their anti-Communist members in a hunger strike. I was held for a duration of 10 (ten) days under arrest." He then reflects that there was a popular outcry in Shkoder for his release and a recognition by the president that he was being jailed illegally. And, hence, he was released after these 10 days. In respondent's testimony, he reflected that his arrest was because he didn't accept the weapons, apparently when ordered to do so, in this political situation concerning this hunger strike. In other words, he disobeyed an order of a higher-up in his chain of command, which, if nothing more, is more detailed than found anywhere else in his application. In his testimony he said that when he was incarcerated he was kicked and beaten. In fact, he claimed his wife was sent a note that he was almost dead. Respondent, of course, could not

give the Court a rational explanation as to why this extreme beating and torture was not mentioned in any of his applications, raising a red flag with respect to his verity. He also testified that he was obviously beaten and his physical condition showed this.

Unfortunately, his wife testified with respect to this incident and was asked to describe on direct examination the respondent's physical condition at the end of this 10 days of incarceration. She described it at this juncture as exhausted and upset. As this was inconsistent with respondent's claims that he had been beaten to a pulp and was almost dead, on cross-examination she was asked to further describe his condition beyond the words upset and exhausted. She added, sad. Of course, nowhere does she mention any physical injuries to the respondent when given the opportunity to do so, raising another red flag with respect to the respondent's verity.

Continuing now with Exhibit 2 and its continuing statement, the Court notes that the respondent in his testimony added detail to the statement that wasn't provided in any of the applications or this continuing statement of August 24th. And that was that his son, there was an attempted kidnapping

on him two times. When asked on cross-examination as to why he didn't put that in any of his applications, he said that he had no experience in filling out these applications and he was told to be short, again raising another red flag with respect to respondent's credibility. The exact nature of the kidnapping and other issues with respect to its believability will be addressed when talking about the wife's testimony, as well as the son's testimony.

Of course, in respondent's application as found at Exhibit 2, specifically, the August 24th continuing statement, he indicates, of course, that his fellow court policemen had been killed. And in his testimony he reflects that he feared also being killed because people that he had arrested, and who just happened to be Muslims, had been released during the general anarchy and otherwise in Albania that occurred in about 1997. Of course, these matters do not provide him a basis for seeking asylum or withholding under the statute as this is one of the vicissitudes of being a police officer.

Also appended to Exhibit 2 is a birth certificate of his son, Mendrit. Of course, the Court notes that this Albanian document has to be fraudulent, as the son testified his real name was Madrid. When asked why his father would misspell

his name in all of the applications and give the Court a birth certificate with a different name, the only excuse that the son could really proffer would be that his father has a proclivity not to be completely honest.

Exhibit 3 is another application, as previously described, that is essentially the same as Exhibit 2. Again, of course, it contains some somewhat inconsistent statements. For instance, at page 1 it reflects that respondent entered the United States on March 1st of 1997 and at page 2 it says his wife arrived on March 10th of 1997, even though their testimonies are that they arrived the same day. This, of course, is the same information that is contained for these matters at Exhibit 2. It also has his son's name misspelled. Also attached to Exhibit 3 area number of tabbed documents. Many of them are also appended at Exhibit 2 .

Two of the attachments are of particular import. First, we have again the same birth certificate for his son that spells his name Mendrit, which we know is not correct. And even though his issue was pointed out during this court, the respondent never gave the Court a viable explanation as to how he would proffer a wrong birth certificate for his son.

Most importantly, however, attached at tab 29 of Exhibit 3 is a so-called top secret document of the Ministry of Internal Affairs, the Commissariat of Police of Shkoder, that orders that respondent be arrested and killed. This document was sent, along with many of the other documents, to Albania for investigation and the state Department's investigation demonstrated that this was a fraudulent document.

When asked to discuss the fraudulent character of this document, respondent claimed that a former police officer, who was a subordinate of his, obtained this document approximately 30 days before this other police officer was fired for political reasons, and then that this person then took this document to the father of the lead respondent to transmit it to the United States. During the course of lead respondent's testimony, he said that this document was genuine, that it could not possibly be fraudulent. When giving the opportunity of backing out of this by saying that perhaps it was fraudulent and he didn't know it, he refused to take that opportunity. On the other hand, when his father was called to testify, respondent's father wasn't asked one question about this document, which leads the Court to only conclude that this document is fraudulent.

Respondent's application for asylum was sent to the State Department for a comment when it was received. The Court obtained the comments back on June 14th of 1999. The comment is found at Exhibit 4 and it is the Profile of Asylum Claims and Country Condition Reports, as offered by our State Department updated through November of 1998. This document demonstrates that much of what respondent said about his maltreatment may not be consistent with country conditions. For example, the November 1998 Profile says that the secret police have been smaller and less active in recent years and "the organization no longer has an apparent political role. Far more prevalent is organized and amateur crime exacerbated by the glut of firearms, extreme poverty, and difficulties in constituting the forces to maintain public order." Also appended to this is the September 1997 Profile, which indicates that there was anarchy and a breakdown in the country in the summer of 1997. It also notes at page 4 of the 1997 document that the Sheik were used for political reasons under the Democratic Party, the party associated and affiliated with the lead respondent, something that is inconsistent with the respondent's claim, as he claims that the Democratic Party wasn't using this for political purposes, but

it was the remaining Socialists who were still in the Sheik a year and a half after the Democrats took power.

Exhibit 5 is the Torture Convention application. It reflects at pages 1 and 3 that both the respondent and his spouse arrived in the United States on March 1st of 1997. Curiously, the testimony of the lead respondent's wife indicated that they actually arrived on March 10th of 1997, and it was the admitting officials here in the United States that stamped their passport erroneously, Of course, his son's name is also misspelled, and quite significantly so, at page 3 of Exhibit 5. Also appended to Exhibit 5 are the English-sworn statements of several individuals who basically say little or nothing about the *res gestae* of the respondent's claims.

In anticipation of an earlier hearing date, the Government proffered what has been received into evidence as Exhibit 6, as it was initially proffered. It contains tabs 1 through 10. Exhibit number or tab 1 of Exhibit 6 is the Country Reports offered by the State Department for 1998. It says at page 1 that the sheik and its predecessor organization had a long history of engaging in political repression under previous governments. However, under the Socialist

government, it has become smaller and less active, "and the organization apparently no longer has a political role." It talks about at page 2 the massive civil unrest in 1997 and the fact that Azem Hajdari, a Democratic Party party member or member of Parliament, was assassinated in September of 1998. Now, the Court notes that respondent took the stand and claimed that the secret order relating to his arrest and detention, that is, the lead respondent's arrest and detention, was part of the plot to kill Azem Hajdari and that it was published approximately 30 days before Azem Hajdari's murder. However, the respondent places this secret order in 1997, as well as the assassination of Azem Hajdari in 1997 as well. Obviously, the 1997 date for Azem Hajdari is not true, again corroborating the fraudulent character of this particular document. Also within the 1998 Country Reports it notes that the police were often unable to maintain order in Shkoder in February of 1998.

At Exhibit 7, the Government submitted on April 13, 2000, and, again in anticipation of an earlier hearing date, three more documents; the 1999 Country Reports, a request for document verification and the investigation report from the American Embassy. These are tabbed respectively as tabs

M, N, and O. These were designed to continue the Exhibit 6 and, rather than using numbers, the Government switched to letters. The 1999 Country Reports at tab M reflect that police waged major operations in many districts in Albania to try to get back to normalcy. One of the areas was in Shkoder and the Government believes that are 32 criminal gangs operating throughout the country.

The transmission at tab N reveals that a number of documents were sent to the State Department for investigation, including documents that show what the respondent's occupation was, as well as both documents relating to identity and occupation of his wife.

The investigation is found at tab O. Virtually all of the documents that were transmitted were genuine. See tab 0, page 2, 3, 4. However, the order for detention, allegedly issued on August 15th of 1997 by the police commissariat of Shkoder ordering that respondent be arrested and killed, had not been issued and the signatures on the document were forged. It also notes that a summons issued on March 8th of 1997 by the police commissariat in Shkoder could not be verified because documents from that time frame were burned. Now, the Court notes that respondent was put on

notice of this fraudulent character of his exhibit in April of 2000 and the testimony was not taken in this court until February of 2004, and yet respondent did nothing to get this document authenticated and did not even call his father to testify about how the father got this, as previously mentioned. So the Court can only conclude that the state Department's investigation is correct.

At Exhibit 8 is an article dated May 28, 2000. It reflects as to what happened in Albania since respondent departed. The respondent has also provided similar evidence at Exhibit 9 pursuant to matters published by the Amnesty International in 2000.

At Exhibit 10 we have more newspaper articles proffered by the respondent, talking about what happened in Albania in 1996, as well as 2002. These documents are consistent with previous documents found in the record, at least as far as country condition reports, the 2002 Country Reports, as well as the 2001 Profile, which were received into evidence as a Government exhibit at 11.

In Exhibit 11 are the documents previously mentioned. It reflects that in today's Albania there are no confirmed cases of political killings for the year 2002, that

there was a peaceful election in August of 2001. Page 2 of the report reflects that there were no politically-motivated disappearances. Page 4, no reports of political prisoners. While it does reflect in other portions of the these reports that the police are sometimes corrupt, there is no pattern or practice of persecution to a group of persons who are similarly situated to this lead respondent.

Also at tab R of Exhibit 11 we have the May 2001 Profile. It also notes that the two major parties trace their roots back to the Communist, but that Communists are completely different as far as policy and practice than the current government of Albania. In fact, it notes on page 4 that both parties traced its roots to the Communist regime and both repudiated thoroughly. At page 3, it shows that there was an implosion of anarchy in 1997, but the country has slowly and steadily resumed normalcy. At page 4, many applicants under today's circumstances will unlikely have credible claims to political persecution. At page 6, the Sheik no longer has an internal political role. So things have changed in Albania to the extent that respondent's story can be believed, but this also helps to demonstrate that the conditions were not exactly as respondent paints them to be.

Respondent at the conclusion of his testimony was asked about if he had ever been arrested in the United States, and he said, yes, he was arrested shortly after he arrived because he had been involved in a traffic accident and he had no papers to demonstrate who he was. He also reflected he had been arrested twice because his son had come home late and he was yelling at him. When asked, however, if he had ever been convicted, he said no. The Government then produced Exhibit 12, which was received into evidence, to demonstrate that respondent had, in fact, pled guilty to resisting and obstructing a police officer and domestic violence and battery on his wife. Although the domestic violence charge might have been dismissed, he still was convicted not of any incident vis-a-vis his son, but assaulting and battering his wife. When shown these records, respondent then had to concede that his testimony was inaccurate and that, yes, he did have some convictions. Of course, he could not give the Court a decent explanation or credible explanation as to why none of the arrests were placed in either Exhibit 2, 3, or 5. The conviction record itself shows that respondent pled guilty on March 29th of 2001. Certainly, respondent should have brought this to the Court's attention

and we all know that at least one of the arrests was at a time he had filed all three applications. But this is again just another indicia of the respondent denying his conviction under oath. It demonstrates the respondent's credibility is certainly suspect.

The first witness to testify was the lead respondent. He began his testimony by reflecting that he had been politically active; me and my family and I am "the main one." He then talked about, of course, being the chief of police in the Shkoder district until August 15th of 1994. Then he the chief of police of Malise Mhalle, the chief of criminality in the district. And then in January of '97 chief of criminality in the town of Shkoder. When asked why he Was transferred from Shkoder to Malsi e Madhe, this is when he gave the Court the explanation that he didn't want to interject weapons into this hunger strike, whatever that meant. Again, like most of his testimony, his testimony was vague and ambiguous.

The Court notes the respondent also testified that he came to the United States alone on January 13th of 1997 for 25 days and when he returned on March 10th of 1997, they erroneously stamped his passport as March 1st.

When discussing the fraudulent nature of his document, he went into a long discussion about how on May 5th of 1994 he interjected himself into a situation that involved Fatos Nano and, basically, he turned back a car. The Court notes that, again, this was somewhat nonsensical to the Court and, furthermore, the incident was not referred to in Exhibits 2, 3, or 5.

Lastly, the respondent testified that the whole family will be killed by the Communists if we return to Albania, something that is not verified by current country conditions. Even if the respondent's story were otherwise true and, of course, because of the fraudulent character of his testimony and the inconsistent nature with respect to his application, as well as internally in his own testimony, the Court is finding that respondent has not demonstrated what he claims happened to him happened to him in Albania.

Again, the second witness to testify was respondent's wife of 21 years. The Court has addressed most of her testimony to the extent it's cogent and necessary for a decision in this case. The major part of her testimony, however, is when she failed to describe the respondent's injuries after being held for 10 days, as discussed above.

When the wife did not testify with respect to the attempted kidnapping of the son, the Court asked her a series of questions as to when the kidnapping happened. She said at first she couldn't tell the Court when it happened. The Court then asked her to describe perhaps a year. After sitting pensively a long time, she said 1997. As they came to the United States in early March of 1997, the Court thought that she could come up with a date better than that. She was then asked whether she could come up with a month. She then said February, which would have been the last full month that they were in Albania. When asked what days perhaps in February, she said basically the beginning or up to the middle of February. So, despite the fact that she claimed she couldn't come up with a date, she rather easily, after thinking about it and perhaps relating it to when they left Albania, discovered a fairly firm time frame. But the fact that she was not asked about this, or then was very ambiguous about it when initially asked, again raises a red flag with respect to this incident, especially concerning the fact that it was not in his asylum application.

The next witness to testify identified himself as Madrid, not that as found at tab 14 of Exhibit 3 of the birth

certificate, or is found in the child portion of the applications as found at Exhibits 2, 3, and 5.

He then gave the Court a recitation about not really remembering too much in Albania, as we was young, but that he was attempted to be kidnapped about two or three weeks prior to coming to the United States. However, his description of this does not bear out the fact that even one of them was a kidnapping attempt and, even if you believe his testimony, and the Court does not, it would have been merely speculative.

The next witness to testify was lead respondent's father, Prel Gjetta Vushaj. He was born in 1921 and is now 83. The Court notes that he has made several return trips to Albania since coming here in 1992.

In order to sustain the fact that the current government is out to kill the lead respondent's family, this witness was asked to testify about an incident that happened to him when he returned to Albania. He went back to Albania and was going to his former homestead. He found that the Communists, as he described it, or the Socialists or someone in the government had allowed his home to be taken over. In other words, there were some squatters in his home. He then

went to the home, basically told these people to leave, they left. And then the police showed up and the police ended up in the process of trying to evict the father by machine-gunning him in his legs and then putting him in the trunk of the car and delaying medical treatment. Now, to the extent that this happened in 1993, the Court notes that this witness testified that he was able to go back to Albania on at least two occasions without any difficulties. One was to go back and have a court appearance after hiring an Albanian lawyer and getting a judgment that the property was still his. And he also went back for a funeral a short time ago and had no difficulties then as well. Hence, these trips, some of them occurring after the lead respondent and his family came to the United States, belie respondent's claim that the Communist government is out to kill him and his family.

The next witness to testify was the lead respondent's brother, Gjeto Vushaj. He came here as a refugee in 1990, but despite this fact has been back to Albania on more than one occasion. He did reflect, however, that, in his view, he was arrested one time when he went back to Albania and he was held for 15 or 20 days. Now, the claim was that he had not served in the army and that he was a draft evader, but he

was able to get released based upon the intervention of the United States Government. Now, this witness claimed that he was arrested because of his brother's involvement in the police, as well as the Democratic movement. But he said that nothing was told to him about this. The only person who really mentioned it to him to this possibility, and this was even a very vague and ambiguous reference, was a consular official who visited him in jail, saying that it might have been easier to get him released if his family had not been quite so politically active, or some words to that effect. Again, this witness does not help the respondent either.

The next witness to testify was Martin. He identified the lead respondent and his father. He came to the United States in 1991, became a citizen in 1996, and has been back five times since 1996. He said he went in 1993 and he had no problems. He went in 1995 and had no problems. He went in 1997 and he had no problems. He went when the father was shot and he described how the police guarded his dad in the hospital. He jumps to the conclusion, without giving the Court any viable reasons, that the lead respondent will be killed almost immediately if he were to return because the same people who put us in the concentration camp are in

control of Albania. He also explained that his father was shot on December 13th of 2000, which, of course, is a different date than the father, but apparently the father has a faulty memory. That is not that unusual, given the fact that he was 83 years of age. And when the father was asked to clarify this date, he did indicate it was not almost a decade ago, but he couldn't give the Court the year in which he was injured.

Conclusion

The Court notes that respondent has proffered two documents that are known to be fraudulent; one, the birth certificate of his son, and the second the certificate indicating he would be arrested and tortured and killed. The respondent's testimony was inconsistent with his application for asylum, and his testimony could change on a dime when he wanted to change it on a dime; for instance, with respect to whether or not he had ever been convicted in the United Stat·es. It appears that respondent only wants to admit the truth when he is forced to tell the truth.

The Court also notes that respondent's claims were, in many regards, inconsistent with known country conditions. And, accordingly, the Court finds that respondent has not

demonstrated what he claims happened to him, happened to him in Albania. But assuming arguendo that he did demonstrate that anything happened to him in Albania, he reflects that it was done for reasons unrelated to at least the asylum laws of this country and are part of the vicissitudes of being a police officer.

The Court notes that because the respondent is not credible and his story is not believable, the Court will deny his applications for asylum, withholding of removal, and under both the treaty and the statute.

As it is also apparent that respondent has proffered one document that is fraudulent and that it goes to the *res gestae* of his claim, and as the Court's last official act in his case other than announcing the decision was to ask the respondent to explain why his application might not be fraudulent in three separate ways and he was given the opportunity of doing so, the Court is obligated to find, because he could not explain it and the Court concludes that the document is fraudulent, that his application for asylum is frivolous within the meaning of 8 C.F.R. 1208.20.

ORDERS

For the reasons stated above, the Court issues the following orders.

IT IS HEREBY ORDERED that lead respondent's applications for asylum, withholding of removal under the statute, and withholding of removal under the Treaty as it incorporates his family members be denied.

IT IS FURTHER ORDERED that each respondent be removed from the United States to Albania on the charge contained in their respective Notice to Appear.

IT IS FURTHER ORDERED that respondent's application for asylum be deemed frivolous.

/s/ Robert D. Newberry
ROBERT D. NEWBERRY
Immigration Judge